

No. 12,098

IN THE

United States Court of Appeals  
For the Ninth Circuit

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FELICE DI PROSPERO,

*Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

BRIEF FOR PETITIONER.

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FELICE DI PROSPERO,

3191 Washington Street, San Francisco 15,

*Petitioner in Propria Persona.*

FILED

1949

L. P. O'BRIEN,  
CLERK



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**JURISDICTION.**

Felice Di Prospero, petitioner, seeks a recomputation of income tax deficiencies, determined by respondent for the taxable years 1942, 1943, 1944, and 1945, inclusive, for deficiencies in the amount of \$1,945.61, including penalty in the amount of \$648.53 (Tr. 6 and 12). From a decision of the United States Tax Court, hereinafter referred to as Tax Court, entered July 8, 1948, dismissing original petition for review by this Court, on September 28, 1948 (Tr. 8), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code, 26 U.S.C.A., Sections 1141 and 1142.

**STATEMENT OF FACTS AND QUESTION INVOLVED.**

A. The facts herein involved may be summarized as follows:

(a) Petition for redetermination of income tax deficiency as mailed by attorney for petitioner by air-mail, special delivery, registered letter No. 756231 on April 6, 1948, addressed to The Tax Court of the United States, Clerk's Office, Washington, D.C. (Tr. 11).

(b) Above-mentioned petition was attempted to be delivered for filing within the ninety days, as specified by the respondent's letter dated January 9, 1948 (Tr. 6) and as provided by *Sec. 272, Internal Revenue Code (as Amended by Sec. 168(a), Rev. Act 1942)*, but the Tax Court was found closed on the ninetieth day at the time when the petition was attempted to be delivered as evidenced by letter from the United States Post Office, Washington, D.C. (Tr. 11).

(c) The Tax Court, through no fault of petitioner, was unaware of the fact that petition had been offered for filing on the ninetieth day, since the office was closed.

B. The question involved on this review is:

(a) Whether a petition, offered for filing within the ninety days, but filed by the Clerk of the Tax Court on the following day because the office of the Clerk was closed on the ninetieth day at the time petition was offered for filing, is within the jurisdiction of the Tax Court.

**SPECIFICATION OF ERROR.**

(1) The Tax Court erred in dismissing original petition for lack of jurisdiction (Tr. 7 and 8).

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**STATUTES AND REGULATIONS INVOLVED.**

*Internal Revenue Code (1941):*

“Sec. 272 Procedure in General (As Amended by Sec. 168(a), Rev. Act 1942).

(a) (1) Petition to Board of Tax Appeals.— If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals. \* \* \*”

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**SUMMARY OF ARGUMENT.**

A. A day is twenty-four hours, beginning at midnight and ending the next midnight.

B. The ninetieth day ended at midnight.

C. The petitioner had the whole of the ninetieth day on which to perform and file the petition.

D. The Tax Court was closed before the end of the ninetieth day.

E. The Tax Court had jurisdiction in this case.

## ARGUMENT.

### A.

(1) A day is intended as an ordinary day of twenty-four hours, from one midnight to the next midnight. Had a shorter period been contemplated, or a day other than an ordinary day intended, other and different language would have been employed by respondent to express that intention in his letter dated January 9, 1948 (Tr. 12), in which respondent states, in paragraph No. 3, "within ninety days (not counting Saturday, Sunday or legal holiday in the District of Columbia as the ninetieth day) \* \* \*"

(a) As in the case of *Helphenstine v. The Vincennes National Bank, et al.*, 65 S.C. Indiana 589, that Court defines day as:

"a day in its legal as well as in its plain or ordinary and usual sense, means a period of time consisting of twenty-four hours, and including the solar day and the night. Co. Lit. 135, a; Bracton (folio) 264'".

(2) Therefore, respondent intended an ordinary day as the ninetieth day.

### B.

(1) Petition for redetermination of income tax deficiency was mailed by attorney for petitioner via air-mail, special delivery, registered letter No. 756231, on April 6, 1948, addressed to the Tax Court of the United States, Clerk's Office, Washington, D.C. (Tr. 11).



Above mentioned registered letter was received in the Post Office in Washington, D.C., around 2:45 p.m., April 8, 1948, and left that Post Office by special delivery messenger at 4:45 p.m. that day, for delivery to addressee. When the messenger arrived at the address of the Tax Court with the registered letter, on the ninetieth day, as provided by Sec. 272, Internal Revenue Code (as amended by Sec. 168(a), Rev. Act 1942), he found the office closed, as evidenced by letter from the United States Post Office, Washington, D.C. (Tr. 11).

(2) The Tax Court, through no fault of petitioner, was unaware of the fact that petition had been offered for filing on the ninetieth day, since the office of the Tax Court was closed.

(3) Therefore, original petition was offered for filing within the ninety days, as in the case of *John Zimmerman v. Augustus W. Cowan*, 107 S.C. Ill. 631, that Court gives an opinion of what constitutes a day as being:

“where a person is required to take action within a given number of days, in order to secure or assert a right, the day is to consist of twenty-four hours, that is the popular, and the legal, sense of the term”.

As in the case of *The People v. Hatch*, 33 S.C. Ill. 138, that Court grants that:

“so when an act is to be performed on a particular day, the party has the whole of that day on which to perform it”.

As in the case of the *District Court of the United States for the District of Vermont, in the matter of Delvis Welman*, 20 D.C. Vt. 653, that Court states that:

“although divisions of a day are allowed to make priorities in questions concerning private acts and transactions, they are never allowed to make priorities in questions concerning public acts, such as legislative acts, or public laws, or such judicial proceedings, as are matters of record”.

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#### CONCLUSION.

Being that the petition for income tax redetermination was offered for filing before the end of the ninetieth day, the Tax Court had jurisdiction on this matter. Wherefore, I pray that this Court may hear my proceedings and reverse the decision of the Tax Court.

Dated, San Francisco,  
February 2, 1949.

Respectfully submitted,

FELICE DI PROSPERO,

*Petitioner in Propria Persona.*